Josephine Banun ak Pako @ Nur Khatijah binti Abdullah v Hong Leong Bank Bhd

HIGH COURT (KUCHING) — APPLICATION FOR JUDICIAL REVIEW NO JR–02 OF 2007-II
HAMID SULTAN JC
31 OCTOBER 2007

Labour Law — Employment — Compensation — Wrongful dismissal — Backwages — Assessment of — Award of backwages limited to 24 months — Whether order for reinstatement carried automatic entitlement to full backwages

Labour Law — Industrial Court — Dismissal — Wrongful dismissal — Quantum of backwages — Whether within discretion of Industrial Court — Whether reflected finding and observations of facts — Whether Industrial Court could award punitive compensation

The applicant applied for an order of certiorari to quash the part of the Industrial Court's Award No 74 of 2007 awarding the applicant backwages which were limited to 24 months. The accused, a clerk cum teller in the respondent bank was dismissed from her employment after a domestic inquiry to answer a charge of misappropriation of money from the bank. The learned chairman of the Industrial Court recognised the great injustice employed on her by the respondent and awarded her reinstatement and monetary award of backwages to a period of 24 months. The applicant stated that, on the facts and pursuant to the grounds of the award, limiting the monetary award was procedurally flawed and/or it was unreasonable in the *Wednesbury* sense. However, the respondent argued that the order of reinstatement did not carry an automatic entitlement to full backwages and it was erroneous for the applicant to contend that there was an entitlement to full backwages, when the facts of the present case clearly reflected why the Industrial Court had to exercise its discretion to limit the backwages to 24 months.

Held, allowing the application:

(1) This was not a case to provide a 'win win' situation for the applicant and respondent by limiting the quantum of award. The award must reflect restitution for the contemptuous conduct of the respondent who had,

without due care and regard of the employees' interest as a whole, imposed on an honest employee who had diligently served the respondent for about a decade, wrongful and false accusation of misappropriation. As a result, the respondent had destroyed the self respect, esteem of the employee as well as that of her family members, which must had caused great stress to the applicant and her family members. In such cases, there was nothing inequitable or unconscionable for the applicant to be compensated in full (see para 9(i)).

(2) The learned chairman had rightly concluded that 'The fair amount of monetary award must also reflect the punitive element on part of the bank'. However, the computation of award and the limiting of the award to 24 months did not reflect any punitive element at all. In consequence, the learned chairman had fallen into great error (see para 9(ii)).

(3) The Practice Note 1 of 1987 of the Industrial Court could not tie the hands of the tribunal when the justice of the case warranted not to do so. The quantum of backwages was a matter within the discretion of the Industrial Court (see *Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor* [2001] 3 MLJ 529). The quantum of backwages though was at the discretion of the Industrial Court it must reflect the findings and observations. On the facts, it was the finding of the learned chairman that the applicant could not be faulted at all and had in an unusual manner given great salutation to the applicant. However, the award was not reflective of the salutation and/or based on the said findings; it was not consistent to restrict the quantum of the award (see para 9(iii)).

(4) In the circumstances, the award in respect of backwages was to be remitted to the Industrial Court for reassessment on the basis that the applicant was entitled to the salary and benefits she might reasonably had expected to receive during her period of dismissal; principally back pay or wages, including any improvement of terms and conditions which she would had received during that period had she not been dismissed, taking into consideration the collective agreement between the Sarawak Commercial Bank's Association and the Sarawak Bank Employees Union (see para 10(ii)).

[Bahasa Malaysia summary

Pemohon memohon untuk perintah certiorari membatalkan bahagian award Mahkamah Perusahaan No 74 of 2007 yang mengawardkan pemohon gaji yang tertunggak yang dihadkan kepada 24 bulan. Tertuduh, seorang kerani dan juga juruwang di bank responden telah dipecat dari kerja selepas siasatan domestik diadakan untuk menjawab tuduhan menggelapkan wang dari bank.

Pengerusi Mahkamah Perusahaan yang bijaksana telah mengakui ketidakadilan yang dilakukan kepada pemohon oleh responden dan mengawardkan pemohon pengembalian semula kerjanya dan award berbentuk wang gaji tertunggak bagi tempoh 24 bulan. Pemohon menyatakan bahawa menurut fakta dan mengikut alasan-alasan award tersebut, menghadkan award berbentuk wang adalah cacat secara prosedur dan/atau tidak munasabah dalam erti *Wednesbury*. Walau bagaimanapun, responden menghujah bahawa perintah pengambilan semula tidak memberikan hak automatik untuk gaji tertunggak sepenuhnya dan adalah salah untuk pemohon menegaskan bahawa terdapat hak gaji tertunggak, apabila fakta-fakta kes ini dengan jelas mencerminkan mengapa Mahkamah Perusahaan melaksanakan budi bicaranya untuk menghadkan gaji tertunggak kepada 24 bulan.

Diputuskan, membenarkan permohonan:

(1) Ini bukanlah satu kes untuk memberikan satu situasi 'win win' kepada pemohon dan responden dengan menghadkan kuantum award tersebut. Award tersebut mesti mencerminkan restitusi terhadap penghinaan responden yang telah, tanpa berhati-hati dan tanpa memberi perhatian kepada kepentingan pekerja-pekerjanya secara keseluruhan, telah mengenakan ke atas seorang pekerja yang jujur yang telah berkhidmat secara tekun dengan responden untuk hampir satu dekad, tuduhan penyelewengan yang salah dan palsu. Oleh sebab itu, responden telah memusnahkan harga diri, kehormatan pekerja tersebut dan juga ahli keluarganya yang semestinya memberikan tekanan kepada pemohon dan ahli keluarganya. Dalam keadaan sedemikian, tiada sebarang ketidakadilan atau tidak patut untuk pemohon dipampas sepenuhnya (lihat perenggan 9(i)).

(2) Pengerusi yang bijaksana telah dengan betul memutuskan bahawa 'The fair amount of monetary award must also reflect the punitive element on part of the bank'. Tetapi, pengiraan award tersebut dan menghadkan kepada 24 bulan tidak mencerminkan sebarang elemen menghukum langsung. Dengan itu, pengerusi yang bijaksana telah terkhilaf (lihat perenggan 9(ii)).

(3) Nota Amalan 1987 Mahkamah Perusahaan tidak dapat mengikat tribunal apabila keadilan kes memerlukan ia tidak berbuat demikian. Kuantum gaji yang tertunggak adalah satu perkara yang terangkum di dalam budi bicara Mahkamah Perusahaan (lihat *Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor* [2001] 3 MLJ 529). Kuantum gaji yang tertunggak walaupun adalah di bawah budi bicara Mahkamah Perusahaan ia mesti mencerminkan penemuan dan penelitian. Di atas fakta, ia adalah penemuan pengerusi yang bijaksana bahawa pemohon

tidak boleh dipersalahkan langsung dan telah sebenarnya dalam keadaan yang luar biasa memberikan penghormatan kepada pemohon. Walau bagaimanapun, award tersebut tidak mencerminkan penghormatan dan/atau berdasarkan penemuan tersebut; ia tidak konsisten untuk menghadkan kuantum award tersebut (lihat perenggan 9(iii)).

(4) Dalam keadaan ini, award berhubung dengan gaji yang tertunggak perlu diremit ke Mahkamah Perusahaan untuk dinilai sekali lagi atas dasar bahawa pemohon berhak mendapat gaji dan manfaat yang beliau boleh secara munasabah menjangka untuk menerima semasa tempoh pemecatannya; terutamanya gaji yang tertunggak, termasuk sebarang pembaharuan terma-terma dan syarat-syarat yang beliau mungkin telah terima pada masa tersebut sekiranya beliau tidak dipecat, selepas mengambilkira perjanjian kolektif di antara Sarawak Commercial Bank's Association dan Sarawak Bank Employees Union (lihat perenggan 10(ii)).]

Notes

For cases on compensation, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 858–859.

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1435–1440.

Cases referred to

Allahdad Khan bin Alamji v Souhthern Kinta Consolidated Bhd Slim River Award No 60 of 1976 (refd)

Chan Hock Liong v Associated Motor Industries (M) Sdn Bhd [1998] MLJU 132; [1998] 3 CLJ Supp 105 (refd)

Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors [2007] 5 MLJ 441 (refd)

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (refd)

Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor [2001] 3 MLJ 529 (refd)

Edaran Otomobil Nasional v Neoh Hock Lye [1990] 1 ILR 163 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)

Kelab Golf Negara Subang v Mohd Roslan bin Khamis [1992] 2 ILR 239 (refd)

Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sabah & Anor [2000] 4 MLJ 87 (refd)

MP Mathew Palm Oil Sdn Bhd Prai v Arulandu a/l Alponsoh [1991] 2 ILR 1317 (refd)

Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305 (refd)

Nestle Food Store Storage (Sabah) Sdn Bhd v Terrence Tan [2002] 1 ILR 280 (refd)
Oriental Assemblers Sdn Bhd Johor v Zahibul bin Mohamad [1993] 1 ILR 319 (refd)
Sarawak Shell Bhd v Peter Lenjau & Anor [2004] 2 ILR 37 (refd)
Syarikat Kenderaan Melayu Kelantan v Jusoh bin Salleh [1993] 2 ILR 286 (refd)
Syarikat Kenderaan Melayu Kelantan v Transport Workers Union [1992] 1 ILR 101 (refd)
Transport Workers' Union v Selangor Omnibus Col Ltd Award No 62 of 1981 (refd)
UMW Toyota Assembly Services Sdn Bhd v Transport Equipment & Allied Industry Employees'Union [1990] 2 ILR 339 (refd)
Utusan Melayu (M) Bhd v National Union of Journalists' Malaysia Award [1991] 2 ILR 177 (refd)
Web Printers Sdn Bhd v Nandah Kumar s/o PK Menon [1992] 2 ILR 124 (refd)
Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 (refd)

See Chee How (Baru Bian Advocates) for the applicant.
Leonard Shim (Reddi & Co) for the respondent.

Hamid Sultan JC:

[1] This is my judgment in respect of the applicant's application for an order of certiorari to quash that part of the Industrial Court's Award No 74 of 2007 awarding the applicant backwages which were limited to 24 months.

[2] In this application, the applicant sought only to review that part of the learned chairman's decision in holding that the monetary award of backwages be limited to a period of 24 months.

BRIEF FACTS

[3] This is a sad case where the applicant was very unreasonably and unscrupulously accused of a criminal offence and dismissed from employment. The accused was a clerk cum teller in the bank working for more than eight years. One day a sum of RM500 went missing and the applicant was the one who brought it to the attention of all the relevant persons of the respondent immediately and that too on that very same day that the money went missing. Subsequently, a domestic enquiry was held to answer the charge that 'the claimant as the teller of Miri branch had on 1 October 2001 misappropriated RM500 from the account of Marong General Contractor (No 02700060472) when she debited RM500 from the

said account for the encashment of a cash cheque No 457841 presented by Lydia Ujong Eban but she did not pay and return the cheque to the customer thereby causing a loss of RM500 to the bank'. Very admirably, the learned chairman of the Industrial Court was quick to recognise the great injustice employed on her by the respondent and made the following findings, observations and awards namely:

> Regrettably what we have before this court is not even a trace of suspicion that the claimant has committed misappropriation of bank's funds. The bank, has forgotten that it is their bounden duty to discharge untainted proof that the claimant has misappropriated the funds and she has done so dishonestly, to wit she has gained unlawfully and the bank has suffered a loss unlawfully. This is consistent with the definition of 'dishonesty' found in s 24 of the Penal Code. Further consistent with s 403 of the same Code it is not proven on a balance of probabilities that the claimant has committed the misappropriation by converting the funds for her own use or for some other purpose.
>
> *Conclusion*
>
> Adopting the text book authorities referred to earlier in this award to the present case at hand it can be concluded that the body of evidence available tantamount not even to a reasonable suspicion thus not amounting to a belief in the guilt of the claimant, the employee of the bank. In the absence of that belief the bank has no reasonable grounds to sustain the allegation against her. The bank has also failed to make a reasonable investigation into the alleged misconduct by the claimant and the conclusions drawn by the panel of Inquiry is not tenable.
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> From the evidence adduced both in this court and at the disciplinary inquiry, what is available is not even a trace of suspicion that the claimant has misappropriated the funds in question. Her conduct and her consistent explanation to her superior officers both during the time of transaction and before the panel of inquiry is consistent with the discharge of her duties. Her conduct in the alleged transaction and her honest explanation is laudable and consistent with her express contract of employment with the bank. Inter alia, in her 'Terms and Conditions of Employment under Hong Leong Bank Berhad' produced in court as Annexure 'R-6' to the bank's bundle of documents marked in court as COBD she has agreed to the following:
>
> > … k) FRAUDS & MALPRACTICES: You are expected to maintain a standard of conduct and integrity which is beyond reproach. Guidelines and regulations enforced by the bank, BAFIA, Code of Ethics and any guidelines circulated by Bank Negara Malaysia and Association of Banks in Malaysia from time to time must be strictly complied with.
> >
> > If you are found to be involved directly or indirectly in malpractices, fraud, misappropriation, forgery or corruption, disciplinary action, including dismissal and where applicable criminal prosecution, may be taken against you …

Hence pursuant to clause (k) of R-6, it is crystal clear that she has contracted with the bank to undertake her task and responsibility onerously, dutifully and at all times cautiously. She has also at all times especially during the impugned transaction maintained a standard of conduct and integrity which is beyond reproach.

It is only apparent that the claimant has performed her task as a teller responsibly. This is compatible with her job as a teller; by virtue of which she is holds a fiduciary position. She is in effect entrusted to deal with the bank's funds, cash or otherwise. Her action speaks volumes and her immediate reference to her supervisor of the transaction bespeaks of her honesty and integrity wholly consistent with her position as a teller.

…

Remedies

Following from my findings and conclusion above, I now order the claimant to be reinstated to her previous employment. The order of reinstatement is befitting in the case of this claimant as her conduct at work and during the impugned transaction is above board. Her immediate reference to her supervisor COW1 only fortifies her trustworthiness. Further the claimant has expressed her wish to go back to work with the bank as she testified that she has no ill feelings and the bank was just doing their job. She must be commended for being magnanimous after having a sword of Damocles over her livelihood. The bank on the other hand has not shown any evidence to refute the claim by the claimant for reinstatement or has negated the testimony of the claimant on this aspect of the case. As the bank has not adduced any form of evidence that it does not wish to take the dismissed claimant back to her job, this court cannot take an easy approach and decide that it may not be practicable to put the claimant back into the employment with the bank. The bank has also not proffered any evidence of impracticability.

…

On the relief of backwages, the following are my observations.

- The claimants are entitled to backwages from the date of dismissal to the date of hearing;
- The rationale being the claimants will be in full employment with the employer if not for the dismissal, which is found to be unjust, without basis and excuse.
- Practice Note No 1 of 1987 issued by the Industrial Court, which speaks of 'Guidelines on dismissal cases', seeks to limit the award of backwages to a period of 24 months. On the effect of the application of the Practice Direction, I am reminded of the observation made by this court in Award No 94 of 2005, *Chung Sen Transportation v Johny anak Rinip*, also reported in, in the following manner:

> … It has to be borne in mind that the Practice Note is only a guideline as the intitulement suggests and nothing more, thus it serves as a guide to prevent astronomical compensation award being handed down by the

Industrial Court. The practice direction is intended to be no more than a guideline and cannot be exalted into a rule of law reflecting the true effect of the law relating to remedies available to a dismissed workman. In this regard aid is sought from the dicta of Raja Azlan Shah LP (as he then was) sitting in Federal Court in the case of *Jayasankaran v Public Prosecutor* [1983] 1 MLJ 379 …

- However as an arbiter of industrial disputes, this court has to be reminded of the principle of equity and good conscience, the fulcrum upon which the court has to lean on when awarding monetary compensation. This applies with equal force to both the employee and the employer.
- Further the court is also bound by the principle that for an award of back pay, it is the duty of the claimant to mitigate against loss and the burden of proving that the claimant has not done so lies with the employer.
- There shall be an adjustment made to the award if the claimant has been able to secure employment since the date of dismissal. Further if the matter to which the claim relates was to any extent caused by or contributed to by any action of the claimant, the court may reduce the back pay. This is in accord with the principle adumbrated in the case of *Dr James Alfred (Sabah) v Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 MLJ 529. Statutorily, it is also in accord with sub-s 30(5) of Act 177.
- … The aforesaid award of backwages is in accord with the discretion bestowed upon this court in arriving at a fair and reasonable amount concurrent with the facts and circumstance prevailing in the case. On the exercise of discretion I am guided by the case of place *Conway v Queen* [1845] Coc cc 210 (217), where Crampton J had observed that 'the exercise of discretion has been characterised as odious, but where the necessity exists for its exercise, a judge is bound not to shrink from the responsibility devolving on him'. However, in exercising the discretion I have to act purely as an adjudicator and I must resist from being a crusader.

[4] The applicant says before me that: (a) the learned chairman had committed an error of law in limiting the monetary award of backwages to a period of 24 months as this is a case in which reinstatement was ordered and is not a case wherein the court ordered compensation in lieu of reinstatement; (b) the learned chairman, in coming to the decision, has expressly taken into consideration irrelevant issue or question that the claimant should not be allowed to be unjustly enriched; (c) the learned chairman has erred in directing that there is no evidence in the Industrial Court as to any

improvement of the terms and conditions which the claimant would have received during the period had she not been dismissed; (d) the award of backwages is not in accordance with the discretion bestowed upon the court in arriving at a fair and reasonable amount, concurrent with the facts and circumstance prevailing in the case.

[5] The respondent argues that the order of reinstatement does not carry an automatic entitlement to full backwages and it is erroneous for the applicant to contend that there is an entitlement to full backwages, when the facts of the present case clearly reflect why the Industrial Court had to exercise it's discretion to limit the backwages to 24 months. The respondent relies, inter alia, on the following cases and authorities where it was decided as follows:

(i) In *Transport Workers' Union v Selangor Omnibus Co Ltd* Award No 62 of 1981 where the court did not award any compensation, although it ordered reinstatement.

(ii) Learned author OP Malhotra in his well known treatise *The Law of Industrial Disputes* succinctly explained the effect of an order of reinstatement and whether there is an automatic right to full backwages and stated:

> Neither reinstatement nor payment of backwages as such is a common law right. But these reliefs can, however be granted by the Industrial Tribunals in the course of Industrial adjudication. The effect of reinstatement is to restore an employee to his former capacity, status, and emolument, as if his services had never been terminated and the employee gets the benefit of continuity of service. In the absence of cogent reasons to the contrary such compensation should normally be equal to the full wages or remuneration he would have received had he continued in service but for the order of termination of service. However there are exceptions to this rule where the tribunal in its discretion may deny or reduce backwages for instance, the extent of income, if any, earned by the workman elsewhere during the period of his enforced unemployment and the nature of the efforts of the absence thereof, on his part to secure alternative gainful employment will be relevant factors to be taken into account in denying or scaling down quantum of backwages …
>
> … such discretion must be exercised having regard to certain approved principles and procedure. A workman directed under an award to be reinstated with backwages would not be entitled to backwages for the period during which he was usefully employed elsewhere because he cannot be allowed to take double advantage and make excessive gains relying on the wrongful acts of his employer.

(iii) In the case of *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 the employee had

contended that the Industrial Court had no jurisdiction to limit the backwages to 12 months salary after holding the dismissal to be unfair. The Federal Court rejected this argument.

(iv) In *Koperasi Serbaguna Sanya Bhd, Sabah v Dr James Alfred, Sabah & Anor* [2000] 4 MLJ 87 the Court of Appeal stated that in industrial law involving compensation for unfair dismissal, there are only two types of compensation, which are backwages and compensation in lieu of reinstatement. The Court of Appeal held as follows:

> In industrial law, the usual remedy for unjustified dismissal is an order of reinstatement. It is only in rare cases that reinstatement is refused. For example, as here, where the relationship between the parties has broken down so badly that it would not be conducive to industrial harmony to return the workman to his place of work. In such a case, the Industrial Court may award monetary compensation. Such an award is usually in two parts. First, there is the usual award for the arrears of wages, or backwages, as it is sometimes called. It is to compensate the workman for the period that he has been unemployed because of the unjustified act of dismissal. Second, there is an award of compensation in lieu of reinstatement.

(v) In *Chan Hock Ling v Associated Motor Industries* [1998] MLJU 132; [1998] 3 CLJ Supp 105 an application was made for variation of the award on the following basis 'On reinstatement the claimant (applicant) is entitled to full arrears of backwages from the date of dismissal to the date of reinstatement'. The court in dismissing the application held as follows: 'It is to be noted that reinstatement and backwages are two separate things and one does not render the other ambiguous or uncertain'.

(vi) In *Utusan Melayu (M) Bhd v National Union of Journalists' Malaysia Award* [1991] 2 ILR 177 the court had handed down an award of reinstatement and arrears of backwages which was limited to 24 months. The Union, on behalf of the employee, applied to the court for a variation of the award on the basis that where the order of reinstatement is made, it carries with it the right to full backwages. The court in dismissing the application drew support from the case of *Allahdad Khan bin Alamji v Southern Kinta Consolidated Bhd Slim River* Award No 60 of 1976 where the court held '… there are two limbs of the payment of such compensation. First upon an order of for reinstatement, the claimant became entitled to back pay either in full or in part depending upon circumstance'.

(vii) There are a string of Industrial Court awards wherein reinstatement had been ordered although backwages have been limited to 24 months as in the instances of *Kelab Golf Negara Subang v Mohd Roslan bin Khamis* [1992] 2 ILR 239, *Oriental Assemblers Sdn Bhd*

Johor v Zahibul bin Mohamad [1993] 1 ILR 319, *MP Mathew Palm Oil Sdn Bhd Prai v Arulandu a/l Alponsoh* [1991] 2 ILR 1317, *UMW Toyota Assembly Services Sdn Bhd v Transport Equipment & Allied Industry Employees' Union* [1990] 2 ILR 339; *Web Printers Sdn Bhd v Nandah Kumar s/o PK Menon* [1992] 2 ILR 124 and *Syarikat Kenderaan Melayu Kelantan v Jusoh Bin Salleh* [1993] 2 ILR 286.

THE LAW

[6] It is trite that the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. An order of certiorari will lie to quash a decision which has already been made by an inferior court or administrative tribunal or other public authority in excess or abuse of jurisdiction or contrary to the rules of natural justice, and where there is an error of law on the face of the decision of such a tribunal. In *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305, in dealing with an appeal concerning the appellant's application for an order of certiorari and mandamus to quash the Minister's decision, the court opined:

> … The court is more concerned with the decision-making process and not the decision itself. The court should not readily question the administrative decision of the first respondent as that is his absolute discretion. If the first respondent had acted ultra vires, unfairly or unjustly in exercising his discretion, then it is the duty of the courts to interfere in an application for review of that decision. The underlying principles of judicial review have been stated in a number of cases, and it is the exercise by those with whom discretionary power is vested, not in the courts, that the courts are required to review.

[7] It is trite that the High Court has jurisdiction in certiorari proceedings to interfere with an award of compensation of Industrial Court. In *Koperasi Serbaguna Sanya Bhd (Sabah)* the court opined:

> It is open to the High Court in certiorari proceedings to interfere with the quantum of compensation awarded by the Industrial Court is in accordance with law. If it is not, there is no reason why an award of compensation may not be quashed. Whether the High Court ought to interfere with an award of compensation in any given case will depend on the facts of the particular case. The ground on which an award of compensation may be reviewed are the same as those on which any decision of a public decision-maker may be challenged. There are at least four reasons why the decision of a public decision-maker may be void, they being, it may be contrary to law, or it may be procedurally flawed, or it may be unreasonable in the *Wednesbury* sense, or it may be disproportionate.

It is the contention of the applicant that the monetary award of backwages is procedurally flawed, or it may be unreasonable in the *Wednesbury* sense, or it may be disproportionate.

[8] The applicant says on the facts and pursuant to the grounds of the award, limiting the monetary award is procedurally flawed and/or it is unreasonable in the *Wednesbury* sense. However, the respondent argues that there is no error of law in limiting backwages to 24 months and relies on the following authorities and practice direction:

(i) In *Hoh Kian Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 at p 390, the Federal Court ruled that the scope of judicial review was wide and an error of law encompasses the following:

> In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 at p 342 the Court of Appeal correctly recognised that *Anisminic* had done away with the distinction between errors of the law that go to jurisdiction and errors that do not. We are of the opinion that the following extract from the judgement of the Court of Appeal accurately declares the present state of the law general law.
>
> > An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of the law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah Bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
> >
> > It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safety said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant consideration or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

(ii) In *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, the court stated:

> A reinstatement order carries with it a prima facie right to an order of the recovery of wages since the date of dismissal. Such order is ancillary to the order of reinstatement. But circumstances vary from case to case and an

employer should be entitled to a remission for various reasons, for example, for any delay in the finalisation of the order which is not entirely his fault.

(iii) In *Sarawak Shell Bhd v Peter Lenjau & Anor* [2004] 2 ILR 37 it was also held that limiting backwages to 24 months would be fair to both parties as it would balance the rights of the company and claimant; the Industrial Court ruled:

> If the claimants feel that they have lost out in not getting either reinstatement and or monetary compensation, part of the cause is the delay that has taken place between the date they were dismissed and the conclusion of their case. The court cannot accept their claim for backwages and compensation in lieu of reinstatement exceeding 24 months. To allow backwages up to the last date of hearing and their service to be calculated to the same date tantamount to punishing the company for the delay in the hearing and completion of this case for which the company is not responsible. It is also true of course that the claimants are also not responsible. Therefore, limiting the backwages to 24 months and the compensation in lieu of reinstatement to the period of actual service is fair and equitable to both parties. Nobody gains or loses arising out of the delay. To allow claims exceeding 24 months due to delays for which no party is responsible would be contrary to s 30(5) of the Industrial Relations Act 1967 which requires the court to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

(iv) In *Nestle Food Store Storage (Sabah) Sdn Bhd v Terrence Tan* [2002] 1 ILR 280 the court stated:

> The court is of the opinion that the basic approach that a workman held to have been dismissed without just cause should be awarded backwages subject to a maximum of 24 months is long established and that there will be undue violence to the existing process of awarding and assessing backwages were some other formula to be applied save in exceptional cases. More importantly, however, the court is of the view that subject to some observations and consequential modifications set out hereinafter, it represents a just and equitable formula for awarding backwages. The court thinks that the formula for awarding backwages provides a workable basis for assessing and awarding a workman's backwages in a sensible and fair way taking into consideration various relevant factors inter alia, his loss of wages, the duty to mitigate and the onus and burden of proof. The prescription of the multiplier of 24 months strikes a right balance between the interests of the parties. It takes into account a realistic and reasonable time frame for the workman to recover from the setback of his dismissal and to be restored to his earning capacity prior to his dismissal. It also takes into account the justifiable concern that delays in the statutory processes of conciliation, reference and adjudication should not inflate the quantum of backwages awarded and unduly

penalise employers by exorbitant awards which have no rational relationship or nexus between loss and liability. The formula affords the workman a monetary award of backwages which is fair and adequate for the loss of the earnings arising from his dismissal.

(v) In *Edaran Otomobil Nasional v Neoh Hock Lye* [1990] 1 ILR 163 Steve Shim J (as he then was) opined:

> It is interesting to note that subsequent to the decision of the High Court, the Industrial Court, in the overwhelming majority of awards in 1988 and 1989, had not considered the principle of mitigation loss. Indeed, in a fair number of instances, the court had instead adopted the guideline in Practice Note No 1 of 1987, limiting computation of backwages to a maximum period of 24 months. This is the method I will adopt in the instant case.
>
> After careful consideration, I therefore make the following orders: (1) Backwages: 26 March 1987 (date of termination) to 23 February 1990 (date of conclusion of hearing) covering a period of 35 months. Adopting the guideline in Practice Note supra, I shall allow a maximum period of 24 months. At the rate of $300 per month as wages, the amount for 24 months is $7,200. This shall be the amount for each of the claimants under this head. (2) Compensation in lieu of reinstatement. This is given at the usual rate of one month salary for each completed year of service. I will allow four months. Therefore, at the rate of $300 per month, the amount is $1,200. This shall be the amount for each of the claimants under this head.

(vi) In *Syarikat Kenderaan Melayu Kelantan v Transport Workers Union* [1992] 1 ILR 101, Steve Shim J (as he then was), in limiting the quantum of backwages to 24 months, held as follows:

> Hearing proper commenced on 27 January 1992. Thus between the date of their dismissals and date of hearing, there is a lapse of over five years. This delay is of course no fault of the company. In any event, in accordance with practice, we shall adopt a multiplier of 24 months.

(vii) 'Industrial Court Practice Note No 1 of 1987 (29 June 1987)' stipulates as follows:

> (a) Back pay in full from the date of dismissal to date of conclusion of hearing, subject to a maximum of 24 months.

[9] I have read the application and the articulate submissions of both parties in detail. I take the view that the application must be allowed. My reasons are as follows:

(i) This is not a case to provide a 'win win' situation for the applicant and respondent by limiting the quantum of award. The award must reflect restitution for the contemptuous conduct of the respondent who had, without due care and regard of the employees' interest as a whole, imposed on an honest employee who had diligently served the respondent for about a decade, wrongful and false accusation of misappropriation of RM500. As a result, the respondent has destroyed the self respect, esteem of the employee as well as that of her family members, which must have caused great stress to the applicant and her family members. In such cases, there is nothing inequitable or unconsciousable for the applicant to be compensated in full. This is a case which warrants to do so.

(ii) The learned chairman had rightly concluded that 'The fair amount of monetary award must also reflect the punitive element on part of the Bank'. However, the computation of award and the limiting of the award to 24 months do not reflect any punitive element at all. In consequence, the learned chairman has fallen into great error as submitted by the applicant. I have dealt with this area of law in great detail in the case of *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007] 5 MLJ 441 and the relevant part is reproduced here as follows:

> A radical change to widen the scope of the above proposition took place in the Court of Appeal's decision in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, where Gopal Sri Ram JCA opined:
>
> > In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
> >
> > It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted. A

(iii) I do not think 'Practice Note 1 of 1987' of the Industrial Court can tie the hands of the tribunal when the justice of the case warrants not to do so. Support for my proposition can be found in a number of cases. The quantum of backwages is a matter within the discretion of the Industrial Court (see *Dr James Alfred*). The quantum of backwages though is at the discretion of the Industrial Court it must reflect the findings and observations. In this case it was the finding of the learned chairman that the applicant cannot be faulted at all and the learned chairman had in fact in an unusual manner given great salutation to the applicant. The award is not reflective of the salutation and/or based on the said findings; it is not consistent to restrict the quantum of the award. B C D

[10] For the reasons stated above, I allow the applicant's application and make the following orders.

(i) An order of certiorari to quash that part of the Industrial Court's Award No 74 of 2007 awarding the applicant backwages which were limited to 24 months. E

(ii) The award in respect of backwages is to be remitted to the Industrial Court for reassessment on the basis that the applicant is entitled to the salary and benefits she might reasonably have expected to receive during her period of dismissal; principally back pay or wages, including any improvement of terms and conditions which she would have received during that period had she not been dismissed, taking into consideration the collective agreement between the Sarawak Commercial Bank's Association and the Sarawak Bank Employees Union. F G

(iii) The respondent to pay the costs of the applicant. The getting up fees shall not exceed RM30,000. If the getting up fees cannot be agreed, the applicant is at liberty to tax his costs. H

Application allowed.

Reported by Sally Kee I